Supreme Court, U.S.
FILED
AUG 21 1997
CLERK

(5)

No. 96-1769

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

OHIO ADULT PAROLE AUTHORITY, et al.,

Petitioner,

v.

EUGENE WOODARD,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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Certiorari granted June 27, 1997

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[1]Exhibits A and B as well as two unlabeled exhibits that were submitted with the complaint are included. Exhibit A is also printed in the text at page 1 of the Petition for Certiorari.

RELEVANT DOCKET ENTRIES

I. IN THE DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

1. 9/14/94 Complaint

2. 9/16/94 Consent Decree

3. 11/23/94 Answer by Defendants

4. 1/9/95 Motion by defendants for judgment on the pleadings

5. 2/9/95 Memo in opposition by plaintiff to motion for judgment on the pleadings, etc.

6. 6/20/95 Report and Recommendation

7. 7/5/95 Objections by Plaintiff to Report and Recommendation

8. 9/8/95 Opinion and Order

9. 9/8/95 Judgment Adopting Report and Recommendation

10. 10/10/95 Notice of Appeal by Plaintiff

II. IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1. 3/3/97 Opinion

2. 3/3/97 Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EUGENE WOODARD,	)	
	)	C2-94-892
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	
OHIO ADULT PAROLE AUTHORITY, et al.	)	JUDGE KINNEARY
	)	MAGISTRATE JUDGE KEMP
Defendants.	)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

Eugene Woodard, by and through his undersigned counsel, brings this Complaint against the Defendants and states as follows:

1. This is a civil action for declaratory and injunctive relief to redress the continuing deprivation of rights secured by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the Constitution of the United States and Title 42 U.S.C. § 1983.

II. PARTIES

2. The Plaintiff in this action is a convicted and capitally sentenced prisoner incarcerated in the Southern Ohio Correctional Facility in Lucasville, Scioto County, Ohio.

3. The Plaintiff brings this action on his own behalf as the Defendants are attempting to apply the Death Penalty Clemency Procedure (attached as Exhibit A) to him.

4. The Defendants are the Ohio Adult Parole Authority (APA), the Parole Board, and the individual members of the APA and the Parole Board in their individual and official capacities. The APA is an independent division of the Department of Rehabilitation and Correction, an agency of the executive branch of the government of the State of Ohio with its offices in Columbus, Franklin County, Ohio. One function of the APA is to make clemency recommendations to the governor of Ohio in death penalty cases. The Parole Board is a division of the APA assigned to reviewing and conducting clemency hearings.

5. Plaintiff does *not* contemplate that this action will have any effect on his state convictions and/or sentences (including his death sentence), nor does Plaintiff intend that this action constitute a petition for habeas corpus.

III. JURISDICTIONAL STATEMENT

6. This Court has jurisdiction over this action pursuant to Article III, Section 2 of the Constitution of the United States and 28 U.S.C. § 1343(a)(3) and §2201.

7. Venue is proper in this district under 28 U.S.C. § 1391(b) and S.D. Ohio L.R. 3.3(c).

IV. FACTUAL BACKGROUND

8. Mr. Woodard has exhausted his direct appeals to the Ohio Court of Appeals, Eighth Judicial District, the Supreme Court of the State of Ohio, and the Supreme Court of the United States denied certiorari. The Supreme Court of Ohio issued a Stay of Execution on August 24, 1994 (attached as Exhibit B) to allow Mr. Woodard to pursue state post-conviction relief and that Stay of Execution is currently in effect. Mr. Woodard's petition for post-conviction relief is due on January 18, 1995.

9. On September 6, 1994, counsel for Mr. Woodard was informally told that a clemency hearing was scheduled for Mr. Woodard on September 16, 1994. Counsel was informed that the APA would interview Mr. Woodard on September 9, 1994, at the Southern Ohio Correctional Facility (SOCF).

10. This hearing and interview were to be conducted according to the new Death Penalty Clemency Procedure (Clemency Procedure) adopted by the APA. Pursuant to the Clemency Procedure, Mr. Woodard is not entitled to have counsel present at the hearing or interview. Furthermore, under the Clemency Procedure neither Mr. Woodard nor his counsel are permitted to present any documentary evidence in support of clemency, nor is testimony allowed, other than the uncounseled statement of Mr. Woodard.

11. On September 7, 1994, counsel for Mr. Woodard sent a letter to the APA objecting to the clemency hearing and interview, requesting the right to be present for all interviews and hearings, requesting a continuance of the proceedings on the basis that a stay of execution was in effect, that counsel was only recently appointed and could not effectively represent Mr. Woodard's interest in a clemency hearing, and that the information and investigation

necessary for a proper and thorough clemency review was not complete.

12. To date the APA has not responded to these requests.

13. On September 9, 1994, counsel for Mr. Woodard visited with Mr. Woodard at the SOCF. The APA did not meet or talk with Mr. Woodard or counsel for Mr. Woodard although all parties were present at the SOCF at the same time.

14. To the best of Mr. Woodard's knowledge the APA continues to intend to conduct an *ex parte* clemency hearing in his case on September 16, 1994. Should this hearing take place Mr. Woodard will be precluded from requesting additional clemency proceedings in his capital case without leave of the APA.

15. Plaintiff is currently engaged in ongoing litigation regarding his individual conviction and sentence. In this case, the State of Ohio is a party, actively seeking the execution of Mr. Woodard. The defendants are agents, representatives, and agencies of the State of Ohio. As such, they cannot require Mr. Woodard to discuss the ongoing litigation without the presence of counsel.

COUNT ONE

16. Plaintiff realleges paragraphs One through Fifteen of this complaint, as if fully rewritten herein.

17. Mr. Woodard will be irreparably harmed in that he will be permanently deprived of his Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendment rights against self-incrimination, to effective assistance of counsel, to be

free of cruel and unusual punishment, to the equal protection of the law, to request and zealously argue for clemency, and to substantive and procedural due process.

18. Mr. Woodard will be irreparably harmed in that he will be permanently deprived of his right to have the State not interfere in and adversely affect his attorney-client relationship and his counsel's ability to effectively represent him in collateral proceedings in the state and federal courts and in future clemency proceedings, which proceedings will directly determine whether Mr. Woodard will live or die.

19. Mr. Woodard will be irreparably harmed in that he will be permanently deprived of his right to have the State of Ohio conduct its clemency process, by which it ultimately decides which death-sentenced prisoners will be executed, in a non-arbitrary and capricious manner after a thorough investigation (as required by Ohio law) and a meaningful opportunity for the prisoner to apply and be considered for clemency.

PRAYER FOR RELIEF

WHEREFORE, Eugene Woodard respectfully requests the following relief:

(1) A declaration that the policy of the APA is unconstitutional in that it tortiously interferes with the Fifth and Fourteenth Amendment rights to remain silent, Sixth and Fourteenth Amendment rights to counsel, the Eighth and Fourteenth Amendment rights to be free of cruel and unusual punishment, and the Ninth and Fourteenth Amendments' guarantee of substantive and procedural due process and to the equal protection of the law.

(2) A preliminary injunction providing that the

Defendants may not interview the Plaintiff without the consent and presence of counsel;

(3) A preliminary injunction providing that the Defendants may not conduct a clemency hearing in regard to the Plaintiff until such time as the plaintiff petitions for such a hearing, or, in the alternative, until such time as there is a thorough investigation as required by Ohio law, including a meaningful opportunity for Plaintiff to apply for clemency;

(4) An order enjoining the Defendants from applying the Death Penalty Clemency Procedure to the Plaintiff;

(5) An order that Plaintiff be awarded costs and attorneys' fees;

(6) An award to the Plaintiff of such other and further relief as the Court may deem just and proper, but *not* including vacation of his state convictions and/or sentences, including his death sentence.

[SUBSCRIPTION OMITTED IN PRINTING]

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

[ACKNOWLEDGMENT OMITTED IN PRINTING]

EXHIBIT A

DEATH PENALTY CLEMENCY PROCEDURE

[CODE AND SECTION REFERENCES OMITTED IN PRINTING]

[APPROVAL SIGNATURE OMITTED IN PRINTING]

EFFECTIVE DATE: JULY 21, 1994

I. *AUTHORITY*

This policy is issued in compliance with Ohio Revised Code 5120.01 which delegates to the Director of the Department of Rehabilitation and Correction authority to manage all Divisions and Institutions of the Department and to establish such rules and regulations as he prescribes.

II. *PURPOSE*

The purpose of this policy is to establish a standard procedure for handling applications for clemency in death penalty cases and for review of death penalty cases where no application has been filed.

III. *APPLICABILITY*

This policy applies to the Ohio Parole Board and other employees of the Ohio Department of Rehabilitation and Correction, who are responsible for collecting and providing information, scheduling hearings, providing notices, etc., and to prisoners under sentence of death and the attorneys representing

them.

IV. *DEFINITIONS*

None.

V. *POLICY*

It is the policy of the Ohio Department of Rehabilitation and Correction to fulfill its duties related to the executive clemency process in a manner that is expeditious and is fair to the condemned prisoner, as well as to the family and friends of the victim and the public at large.

VI. *PROCEDURE*

A. Notification to all condemned inmates of this policy.

1. All prisoners committed to the Department of Rehabilitation and Correction with a sentence of death shall be given a copy of this policy.

B. Information gathering and scheduling of the hearing:

1. At the time the Ohio Supreme Court completes its review of a criminal case upon direct appeal, and fixes an execution date, the institution or office of the department receiving notice of such decision shall forward a copy to the Parole Board.

2. Upon receipt of said notice or upon its own initiative, the Parole Board shall request an investigation into the details of the prisoner's offense, prior record and other relevant information.

3. Forty-five days in advance of any scheduled execution date, unless that date has been stayed, the parole board chair will schedule a clemency review to be held at central office. This clemency review will be scheduled to occur approximately twenty-one days prior to the scheduled execution date. The parole board shall send any required notices to the sentencing court, the prosecutor, and the victim's family or representative.

4. The parole board shall also have a notice delivered to the prisoner advising him that he may request to be interviewed in person by one or more parole board members or hearing officers and have the board consider any statements he may make. The parole board will send a copy of this notice to the office of the public defender or other counsel for the prisoner.

5. Once the clemency review hearing has been scheduled, it shall be completed and a recommendation made to the Governor regardless of any subsequent stay of the execution of the sentence.

C. Interview of prisoner by parole board member or hearing officer.

1. The parole board chair will cause the notice advising that the board will be considering his case for a clemency recommendation to be personally delivered to the prisoner. This notice shall advise him that if he requests it in writing, he will be interviewed by one or more parole board members or hearing officers prior to the board considering his case. The notice shall advise him that he can make the request by noting his desire for the interview on the notice and returning it to the parole board chair. The prisoner will be asked to submit to a psychological or psychiatric evaluation as determined appropriate by the Parole Board.

2. If the prisoner requests the personal interview, the parole board chair will appoint one or more board members or hearing officers to interview the prisoner at the confining institution. Only the prisoner and the person or persons assigned by this parole board chair shall be present at the interview.

D. Attendance at the hearing:

1. The hearing will be held at central office during normal business hours.

2. If the prisoner chose to be interviewed, each of the board members and hearing officers that attended the interview shall attend the hearing to present to the board any information offered by the prisoner.

3. Attendance by others at the hearing is at the sole discretion of the parole board chair.

E. The nature of the hearing:

1. At the hearing, the Parole Board will consider all available relevant information including any application for clemency that the prisoner submitted and any statement that he gave to the board members or hearing officers that interviewed him.

2. The Parole Board shall deliberate and render a decision the day of the hearing if possible.

   Once the decision is made, minutes will be signed by the Parole Board and the decision communicated to the Chief Legal Counsel for the Governor.

3. Within five (5) business days after the Parole Board's decision, the Governor's Office will receive the written report and recommendation. The Parole Board will notify the prisoner, the prisoner's counsel, the

prosecutor, the victim's representative and the Office of the Attorney General of its recommendation.

4. A press release shall be prepared by the Public Information Office and made available to the media after the report and recommendation have been delivered to the Office of the Governor.

F. In the event that there is insufficient time before a scheduled execution to utilize the normal information gathering or hearing process, the normal procedure shall not apply. The Parole Board shall assemble as much information as is feasible under the circumstances. Within the discretion of the chairman of the Parole Board, a hearing may be scheduled, provided, however, that there is sufficient time to arrange for the appropriate Parole Board officials to be present and that the necessary parties either receive the legally-required notice or waive such notice. In the event that a hearing is convened, the provisions of this policy governing such hearings shall apply. In the event that no hearing is held, the chairman of the Parole Board may forward an informational report to the office of Chief Legal Counsel for the Governor.

G. In the event that the Parole Board is made aware of information or circumstances not considered in its initial determination, or upon the filing of a subsequent petition on behalf of

the condemned prisoner, the Parole Board may supplement its initial decision and recommendation with such informational update as may be appropriate. At the discretion of the chairman of the Parole Board, a hearing may be convened for this purpose. If such a hearing is convened, it shall be conducted according to the procedures specified in this policy for the initial consideration. Following any updated investigation or hearing, the Parole Board may elect to notify the office of Chief Legal Counsel for the Governor of an informational update to its original decision, or make a new decision and recommendation.

H. At the time of the notice of a hearing to consider clemency under this policy, or any time subsequent, the family of the victim or a representative may be given the opportunity to waive notice of any subsequent hearings or decisions.

EXHIBIT B

THE SUPREME COURT OF OHIO

1994 TERM

To wit: August 24, 1994

State of Ohio, :
Appellee, : Case No. 92-1257

v. :
ENTRY

Eugene Woodard, :
Appellant. : (Cuyahoga County)

UPON CONSIDERATION of the motion filed by counsel for appellant to stay the execution of sentence in the above-styled cause pending the exhaustion of state post-conviction remedies,

IT IS ORDERED by the Court that the motion be, and is hereby, granted.

IT IS FURTHER ORDERED by the Court that, pursuant to *State v. Glenn* (1987), 33 Ohio St. 3d 601, a stay is granted for a period of 6 months, beginning July 18, 1994, and ending January 18, 1995, to allow appellant an opportunity to file a petition for post-conviction relief. If a petition for post-conviction relief is not filed within the time allotted, this stay will expire. No further time for the filing of the petition will be granted except in unusual circumstances.

IT IS FURTHER ORDERED by the Court that, if a petition for post-conviction relief is filed within the time allotted, a date-stamped copy of the petition shall be filed by appellant with the Clerk of this Court, and this stay shall remain in effect until exhaustion of all state post-conviction proceedings, including any appeals.

IT IS FURTHER ORDERED by the Court that compliance with the mandate and execution of sentence be, and is hereby, stayed for the 6-month period allotted by this order and, if a petition for post-conviction relief is filed within the time allotted, pending the exhaustion of all proceedings for post-conviction relief before the courts of this State.

IT IS FURTHER ORDERED that counsel for the appellant and for the appellee shall notify this Court when all proceedings for post-conviction relief before courts of this state have been exhausted.

(Cuyahoga County Court of Appeals; Case No. 61171)

THOMAS J. MOYER
Chief Justice

[LETTER FROM OHIO PUBLIC DEFENDER TO OHIO ADULT PAROLE AUTHORITY]

September 7, 1994

Dear Ms. Ghee:

This letter is to inform you that we represent Eugene Woodard, Inmate #236-627. It recently came to our attention that the Adult Parole Authority plans to hold a clemency hearing for Mr. Woodard on September 16, 1994. Mr. Woodard did have an execution date of October 7, 1994 but received a stay of execution from the Supreme Court of Ohio on August 24, 1994. The stay was granted on the forty-fifth day before Mr. Woodard's scheduled execution date. As such, Mr. Woodard does not face imminent execution. Moreover, Mr. Woodard is just beginning his state post-conviction appeals. Upon the completion of his state appeals, if relief is not granted, Mr. Woodard will pursue habeas corpus relief in the federal courts. Therefore, as a practical matter, any clemency proceeding at this juncture is just untimely.

We also request the right to be present for, and to actively participate in, any interviews or hearings regarding Mr. Woodard. As Mr. Woodard's attorneys we are charged with zealously representing his interests. We can only do that if we are permitted to participate in all proceedings, prepare and present a proper clemency petition and rebut any arguments made against Mr. Woodard. To this end, we must be permitted to attend and participate in any interview or hearing held regarding Mr. Woodard. We ask that you notify us of the time and place of any interviews and hearings sufficiently in advance so that we can attend and

prepare for them.

Furthermore, we recently took over the representation of Mr. Woodard and are not in a position to effectively represent his interests or present his case. As Mr. Woodard is represented by counsel, he is entitled to the effective assistance of counsel and we cannot provide that assistance without adequate opportunity to prepare for the hearing. Preparation for any hearing, at the very minimum, will require the assimilation of information obtained in the state post-conviction investigation presently being conducted on Mr. Woodard's behalf. Therefore, we request a continuance until February, 1995, in order to properly present pertinent matter to the Clemency Board.

Until that time, we have instructed Mr. Woodard to refuse to discuss his case, life or situation with anyone unless we are present. To this end, we request you cancel the interview planned for September 9, 1994. Not only have we not been formally notified of this interview, or even of the clemency hearing itself, but Mr. Woodard is involved in ongoing litigation of his capital trial and sentence and possesses a Fifth Amendment right not to incriminate himself. Therefore, Mr. Woodard must not comment on his case or discuss his situation with anyone, especially representatives of the State of Ohio.

We look forward to your prompt response to this letter and hope that an appropriate resolution to this situation can be obtained.

[SUBSCRIPTION OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[CAPTION OMITTED IN PRINTING]

AFFIDAVIT OF MICHAEL J. BENZA

1. I am an attorney licensed to practice law in the State of Ohio.

2. I am currently employed as an Assistant State Public Defender with the Office of the Ohio Public Defender, in Columbus, Ohio.

3. I represent Eugene Woodard in all matters relating to his conviction and capital sentence.

4. On September 6, 1994, I was informed that the Ohio Adult Parole Authority had scheduled an interview of Eugene Woodard for September 9, 1994, and that a clemency hearing was scheduled for September 16, 1994.

5. On September 7, 1994, I sent a letter to the Adult Parole Authority requesting that the clemency hearing be canceled, or, in the alternative, that I be permitted to represent Mr. Woodard's interests at any interviews and hearings, and that any interviews and hearings be continued to allow me to prepare for the interviews and hearings.

6. As of September 14, 1994, I have not received any response from the Adult Parole Authority to these

requests.

7. On September 9, 1994, I visited Mr. Woodard at the Southern Ohio Correctional Facility. At that time I was informed that representatives of the Adult Parole Authority were in the institution. Mr. Woodard and I were available to meet with them but they did not meet with us.

FURTHER AFFIANT SAYETH NAUGHT.

[JURAT OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EUGENE WOODARD,	)	
	)	C2-94-892
Plaintiff,	)	
	)	Date filed:
v.	)	September 16, 1994
	)	
OHIO ADULT PAROLE	)	
AUTHORITY, et al.,	)	
	)	
Defendants.	)	

CONSENT DECREE

WHEREAS, the complaint in the above captioned matter having been filed herein, and the Plaintiff Eugene Woodard and Defendants the Ohio Adult Parole Authority, the Parole Board, Jill Goldhart, Margarette Ghee, Walter Echols, Raymond E. Capots, William E. Hudson, Robert E. Smith, H. Richard Gooch, Gloria R. Andrews, Jay R. Denton, and Constance M. Upper having consented to the entry of this order,

NOW, therefore without a hearing on Plaintiff's request for a Temporary Restraining Order and upon consent of the parties hereto, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1) The Clemency Hearing scheduled for Eugene Woodard to be held at 1:00 p.m., on September 16, 1994 at

the Central Offices of the Ohio Adult Parole Authority and before the Parole Board is postponed indefinitely by the Parole Board.

2) While this action is pending no clemency hearings or clemency interviews regarding Mr. Woodard will be held without 30 days notice of this Honorable Court, counsel for Mr. Woodard, and Mr. Woodard.

3) The Plaintiff's application for a Temporary Restraining Order is withdrawn pending the resolution of the Plaintiff's request for a Preliminary and Permanent injunction.

4) All rights and privileges of the parties are hereby reserved.

/s/ Joseph P. Kinneary
Judge Joseph P. Kinneary

Approved:

/s/ Richard J. Vickers	/s/ John J. Gideon
Richard J. Vickers - 0032997	John J. Gideon - 0008151
Assistant State Public Defender	Assistant Attorney General
Attorney for Plaintiff	Authorized Representative
Authorized Representative of	of the Defendants
the Plaintiff	
Trial Attorney	

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[CAPTION OMITTED IN PRINTING]

ANSWER OF DEFENDANTS OHIO ADULT PAROLE AUTHORITY, JILL GOLDHART, MARGARETTE GHEE, WALTER ECHOLS, RAYMOND E. CAPOTS, WILLIAM E. HUDSON, ROBERT E. SMITH, RICHARD GOOCH, GLORIA ANDREWS, JAY R. DENTON, AND CONSTANCE M. UPPER

1. Defendants admit that this Court has jurisdiction in matters brought under 42 U.S.C. §1983, but deny that this Court has jurisdiction over the subject matter of the instant action as alleged in the complaint.

2. Defendants admit the allegations contained in paragraph 2 of the complaint.

3. Defendants admit the allegations contained in paragraph 3 of the complaint.

4. Defendants admit the allegations contained in paragraph 4 of the complaint.

5. Defendants deny the allegation contained in paragraph 5 of the complaint for want of information sufficient to form a belief.

6. Defendants admit that this Court has

jurisdiction in matters brought pursuant to 28 U.S.C. §1343(a)(3) and §2201, but deny this Court has jurisdiction over the subject matter of the instant action as alleged in the complaint.

7. Defendants admit the allegations contained in paragraph 7 of the complaint.

8. In response to the allegations contained in paragraph 8, the defendants admit that the plaintiff has exhausted his direct appeal to Ohio courts; that the United States Supreme Court has denied plaintiff's petition for writ of certiorari; and that the Ohio Supreme Court has issued a stay of execution. For want of information sufficient to form a belief defendants deny that plaintiff's post-conviction petition is due on January 18, 1995.

9. For want of information sufficient to form a belief, defendants deny the allegations contained in paragraph 9.

10. In response to the allegations contained in paragraph 10 of the complaint, the defendants admit that the Death Penalty Clemency Procedure effective July 21, 1994 is applicable to the plaintiff's case and that under those procedures, plaintiff is not entitled to the presence of counsel at the interview or hearing. Defendants deny that plaintiff is not permitted to present documentary evidence in support of clemency. In regard to the offer of testimony, defendants admit that attendance by others at the hearing is at the discretion of the parole board chair.

11. Defendants admit the allegations contained in paragraph 11.

12. In view of the consent order entered on

September 16, 1994, the defendants deny the allegations contained in paragraph 12.

13. For want of information sufficient to form a belief, the allegations contained in paragraph 13 are denied.

14. In view of the consent order issued on September 16, 1994, the defendants deny the allegations contained in paragraph 14.

15. In response to the allegations contained in paragraph 15, the defendants admit that plaintiff is challenging his sentence to death in the courts of Ohio. Defendants further admit that plaintiff may request in writing to be interviewed in accordance with the Death Penalty Clemency Procedure. Defendants admit that the Adult Parole Authority is an Agency of the Executive Branch of the government of the State of Ohio and that the named defendants are employees of that agency. Defendants deny that the Adult Parole Authority and its employees are actively seeking the execution of the plaintiff. Defendants deny plaintiff is required to discuss ongoing litigation.

16. Paragraph 16 does not set forth averments which call for an admission or denial.

17. Defendants deny the allegations contained in paragraph 17.

18. Defendants deny the allegations contained in paragraph 18.

19. Defendants deny the allegations contained in paragraph 19.

20. Defendants deny each and every allegation

contained in the complaint not specifically admitted in this answer.

AFFIRMATIVE DEFENSE

21. The Court lacks jurisdiction over the subject matter of the complaint.

22. The complaint fails to state a claim upon which relief can be granted.

Wherefore, Defendants Ohio Adult Parole Authority, Goldhart, Ghee, Echols, Capots, Hudson, Smith, Gooch, Andrews, Denton, and Upper request that the plaintiff's complaint be dismissed.

[SUBSCRIPTION OMITTED IN PRINTING]

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[CAPTION OMITTED IN PRINTING]

MOTION OF DEFENDANTS OHIO ADULT PAROLE AUTHORITY, JILL GOLDHART, MARGARETTE GHEE, WALTER ECHOLS, RAYMOND E. CAPOTS, WILLIAM E. HUDSON, ROBERT E. SMITH, RICHARD GOOCH, GLORIA ANDREWS, JAY R. DENTON AND CONSTANCE M. UPPER, FOR JUDGMENT ON THE PLEADINGS

Come now the defendants by and through counsel moving the Court for an order rendering judgment in their favor and dismissing the complaint pursuant to Rule 12 (C) of the Federal Rules of Civil Procedure for failing to state a claim upon which relief can be granted. *Morgan v. Churches Fried Chicken*, 829 F. 2d 10, ii (6th. Cir. 1987) A memorandum in support of motion follows.

[SUBSCRIPTION OMITTED IN PRINTING]

MEMORANDUM IN SUPPORT

STATEMENT OF FACTS

The plaintiff has been sentenced to death for aggravated murder. Because the execution was not stayed forty-five days prior to the scheduled execution date, the Ohio Adult Parole Authority (APA) was scheduled to convene on September 16, 1994, to consider whether to recommend to the Governor of Ohio clemency for plaintiff Woodard. Such hearing *(ex parte* meeting) of the Parole Board was pursuant to the provisions of the Death Penalty Clemency Procedure and consist of a non-adversarial review of the record. Based upon the record and submitted correspondence, a recommendation was to be made. Woodard was offered an opportunity to make a statement to the APA by means of a pre-review interview. He declined.

On September 15, 1994, the parties agreed to postpone the clemency hearing in this case and not to re-schedule a hearing while this suit was pending without thirty days notice to the Court and the plaintiff.

Woodard alleges that the Death Penalty Clemency Procedure interferes with his right to counsel, his right to remain silent, his right to be free from cruel and unusual punishment, and his right to substantive and procedural due process. He asks the Court to declare the Death Penalty Procedure unconstitutional on its face and as applied; to enjoin the defendants from interviewing the plaintiff without the consent and presence of counsel, and to enjoin the defendants from conducting any clemency hearing until the plaintiff petitions for such a hearing.

ARGUMENTS AND LAW

In order to grant the relief requested by the complaint, it is submitted that the Court must find that the plaintiff has a right to mercy or some other right mandated by the Constitution or state law; that the clemency procedure is a critical stage in a criminal proceeding to which the right to counsel attaches; and that the clemency process requires the plaintiff to make statements which could tend to expose him to criminal prosecution. Although this Court must liberally construe the complaint in favor of the plaintiff, *Kugler v. Helfant*, 421 U.S. 117, 125-26 n.5 (1975), the Court need not accept conclusions of law and unwarranted inferences cast in the form of factual allegations. *Blackburn* v. *Fisk Univ.*, 443 F.2d 121, 124 (6th Cir. 1971). The defendants respectfully submit that as a matter of law, the plaintiff cannot establish any facts to support his claims.

THERE IS NO CONSTITUTIONAL RIGHT TO MERCY IN OHIO

The Federal Constitution gives to the President the "Power to grant Reprieves and Pardons for Offenses against the United States." Art.II, § 2. cl. 1. Other than reposing power in the President to grant pardons and reprieves, the Constitution itself is silent on the matter clemency for convicted criminals. Accordingly "...[A]n inmate has no constitutional or inherent right to commutation of his sentence." *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981); *Otey v. Stenberg*, 34 F.3d 645 (8th Cir. 1994); *Otey v. Hopkins*, 5 F.3d 1125 (8th Cir. 1993).

Nonetheless, a right can be created by state law which is entitled to due process protection through the Fourteenth Amendment. *Meachum v. Fano*, 427 U.S. 215, 226 (1976). No right to due process arises except where the state undertakes to deprive a person of one or more specified interests: life, liberty, or property. *Inmates v. Ohio Adult*

Parole Authority, 929 F.2d 233, 235 (6th Cir. 1991). There is no "liberty" interest in early release (or commutation of sentence). *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 2 (1979); *Connecticut Bd of Pardons v. Dumschat, supra.*

A ground for a constitutional challenge, if any, must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency. *Connecticut Bd. of Pardons v. Dumschat, supra* at 465; *Sweeton v. Brown*, 27 F.3d 1162, 1168 (6th Cir. 1994). However, an underlying right must exist before due process protection vests. *Connecticut Bd. of Pardons v. Dumschat, supra.* at 464.

Article III §11 of the Ohio Constitution vests in the Governor the power

> ...after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as he may think proper; subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law.

In *State ex rel. Maurer v. Sheward*, Case # 93-1165, (Ohio Supreme Court, December 30, 1994), the Ohio Supreme Court stated that " The General Assembly is not authorized to prescribe substantive regulations concerning the Governor's discretion in the use of the clemency power, or in any way intrude on the discretion of the Governor. For example, the General Assembly could not, acting under the limited authority provided by Section 11, Article III, enact a statute requiring the Governor to accept the recommendation of the APA in the exercise of his clemency power. Likewise, the General Assembly could not enact a statute

forbidding the Governor from exercising the clemency power in any specific class of cases."

The effect of the *Maurer* decision is that with respect to any form of clemency there is no Ohio law regulating the Governor's discretion in the use of the clemency power beyond Article III of the Ohio Constitution. Accordingly, in Ohio, state law establishes no criteria, entitlement or duty with respect to clemency in a death penalty case. Therefore, Woodard can identify no state-created right to which Fourteenth Amendment due process rights apply. *Connecticut Bd of Pardons v. Dumschat, supra* at 465-67.

Assuming *arguendo,* that a pending motion for reconsideration of *Maurer* results in the Ohio Supreme Court reversing itself by holding that all of the Governor's clemency powers can be procedurally regulated under the Ohio Constitution, the defendants respectfully submit that no state-created right in clemency is established by the laws of Ohio and thereby entitled to due process protection.

O.R.C. §2967.07 provides:

> All application for pardon, commutation of sentence, or reprieve shall be made in writing to the adult parole authority. Upon the filing of such application, or when directed by the governor in any case, a thorough investigation into the propriety of granting a pardon, commutation, or reprieve shall be made by the authority, which shall report in writing to the governor a brief statement of the facts in the case, together with the recommendation of the authority for or against the granting of a pardon, commutation, or reprieve, the grounds therefor and the records or minutes

> relating to the case.

Page's Ohio Revised Code, Annotated (1993). Accordingly, the statute allows the Governor to *sua sponte* direct the APA to review a capitol case for clemency and submit a recommendation. The statute does not require an inmate to initiate or participate in the proceedings.

The APA is guided in developing its recommendation by O.R.C. §2967.03, which provides in pertinent part:

> The authority may recommend to the governor the pardon, commutation, or reprieve of sentence of any convict or prisoner, or grant a parole to any prisoner, if in its judgment there is reasonable ground to believe that, if the convict is granted a pardon, commutation, or reprieve, or the prisoner is paroled, such action would further the interests of justice and be consistent with the welfare and security of society. However, the authority shall not recommend a pardon or commutation of sentence of, or grant a parole to, any convict or prisoner until the authority has complied with the applicable notice requirements of section 2967.12 of the Revised Code, and has considered any statement made by a victim or a representative member of a victim's family that is relevant to the convict's or prisoner's case and that was sent to the authority pursuant to division (C) of section 2943.041[2943.044.1] or division (C) of section 2945.07 of the Revised code and any other statement made by a victim or a representative member of a victim's family

that is relevant to the convict's or prisoner's case and that was received by the authority after it provided notice of the pendency of the action under section 2967.12 of the Revised Code. The trial judge and prosecuting attorney of the trial court in which a person was convicted shall furnish, at the request of the authority, a summarized statement of the facts provided at the trial, and of all other facts having reference to the propriety of recommending a pardon or commutation, or granting a parole, together with a recommendation for or against a pardon, commutation, or parole, and the reasons for such recommendation.

Page's Ohio Revised Code Annotated (1993).

Section 2967.03 is further implemented by Ohio Administrative Code, Chapter 5120:1-1:

A. All applications for pardon, reprieve or commutation of sentence shall be made in writing to the Chief of the Adult Parole Authority.

B. When an application for a pardon, reprieve or commutation of sentence is filed with the Chief of the Adult Parole Authority, the authority shall conduct such investigation as is necessary and make a recommendation to the governor. A hearing may be held at the discretion of the Parole Board. Such hearing if held, shall be before at least a majority of the members of the Parole Board.

C. At least three weeks prior to any hearing held to consider pardon, reprieve or commutation of sentence, notice of such hearing shall be sent to the prosecuting attorney and the judge of the Court of Common Pleas of the county in which the indictment against the applicant was found, and, if required by section 2967.12 of the Revised Code, to the victim or victim's family. Where there is more than one judge of the court of common pleas, the notice shall be sent to the presiding judge.

D. Such notice shall contain the following:

1. The name of the applicant;
2. The crime for which the applicant was convicted;
3. The date of conviction;
4. The term of sentence.

E. In the event the hearing is continued, notice of such continuance and the date of the continued hearing shall be sent to all interested parties at least ten (10) days prior to the date of the continued hearing.

F. In the event the decision of the Parole Board is to recommend for or against pardon, reprieve, or commutation of sentence, such recommendation shall be forwarded to the Governor, together with a brief statement of the facts, the grounds for such recommendation, and the record or minutes of the case.

G. The decision of the Parole Board to recommend for or against pardon, reprieve or commutation of sentence shall be within its sole discretion and shall not be subject to administrative review.

H. If the adult parole authority receives an application for pardon, commutation or reprieve for a person for whom executive clemency was denied less than two years earlier than the date the subsequent application was received, and the authority does not believe that the application contains any grounds that were not or could not have been presented in the earlier application, the parole authority may forward the application to the governor with the recommendation that it be denied on the basis of the earlier review and denial. In such a case, no hearing and no further investigation shall be necessary unless specifically requested by the governor.

I. The adult parole authority shall consider a case for pardon or commutation only upon the application of the convicted person or his counsel or at the direction of the governor.

It is clear that neither Chapter 2967 of the Revised Code nor 5120:1-1-15 of the Administrative Code dictate explicit standards which require the Adult Parole Authority or the individual defendants to recommend clemency or for the Governor to grant or deny clemency. Indeed, in *Wagner v. Gilligan*, 609 F.2d 866 (6th Cir. 1979), the Sixth Circuit held that "...§2967.03 is purely discretionary." Id. at 867. In *Inmates v. Ohio Adult Parole Authority*, 929 F.2d 233 (6th

Cir. 1991) the Sixth Circuit elaborated its construction of §2967.03:

> The statute says that the Ohio Adult Parole Authority "*may*...grant a parole to any prisoner if in its judgment there is reasonable grounds to believe that, if ... the prisoner is paroled, such action would further the interests of justice and be consistent with the welfare and security of society." Ohio Revised Code §2967.03 (emphasis supplied) The grant of discretion contained in the statute is, obviously, very broad indeed. The operative verb is permissive, not mandatory: to say that the Adult Parole Authority "may grant" parole is not to say it must grant parole.

Id. at 236.

The clear weight of authority in both the Ohio and federal courts construing §2967.03 is that Adult Parole Authority action pursuant to the statute is entirely discretionary. *State ex rel. Blake v. Shoemaker*, 4 Ohio St. 3d 42 (1983); *State ex rel. Hattie v. Goldhardt*, 69 Ohio St. 123 (1994); *Inmates v. Ohio Adult Parole Authority*, *supra* at 235; *Wagner v. Gilligan*, *supra* at 867; *Sweeton v. Brown*, *supra* at 1167. *See also Olim v. Wakinekona*, 461 U.S. 238, 249 (1983); *Jago v. Van Curen*, 454 U.S. 14, 17 (1981). Accordingly, there is absolutely no basis to find that Ohio law has created a liberty interest in clemency to which due process rights under the Fourteenth Amendment attach. *Sweeton v. Brown, supra.*

THERE IS NO SIXTH AMENDMENT RIGHT TO COUNSEL IN CLEMENCY PROCEEDINGS

The Sixth Amendment right to counsel by its very terms is limited to criminal proceedings. *Hannah v. Larche*, 363 U.S. 420, 440 n.16 (1960). Clearly the clemency review of the Adult Parole Authority cannot be considered a criminal proceeding.

Likewise, an argument that clemency review is an integral part of the prior criminal proceedings in a capital case is devoid of merit. The Constitution does not require a state to enact a clemency mechanism at all. *Herrera v. Collins*, 113 S.Ct. 853, 867 (1993). Furthermore, it is well settled that the right to counsel extends only to the first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Pennsylvania v. Finley*, 481 U.S. 551 (1990); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989); *Coleman v. Thompson*, 111 S.Ct. 2546, 2566 (1991). Accordingly, an *ex parte* clemency review by the executive branch of government cannot be a "critical stage" in the criminal proceedings to which the right to counsel obtains.

Moreover, there is no right to counsel at a pre-sentencing hearing with a probation officer. *United States v. Hicks*, 948 F.2d 877 (4th Cir. 1991); *United States v. Jackson*, 886 F.2d 838 (7th Cir. 1987). If the Sixth Amendment right to counsel does not extend to an interview with a probation officer the results of which will be communicated to the court and considered in the imposition of sentence, it is clear that the right to counsel does not extend to an interview for the purposes of clemency conducted long-after the direct appeal is final.

Furthermore, contrary to the conclusory allegations of the complaint, the Death Penalty Clemency Procedures do not interfere with the "attorney-client relationship and counsel's ability to represent [Woodard] in state and federal courts and future clemency proceedings...." The procedures

do not in any manner deny Woodard the right to consult with counsel prior to making an election whether or not to submit to an interview by the Parole Board, the desired message to the Board during the interview, and what matters to submit to the Board in support of clemency.[1] Indeed, counsel is free to submit any briefs or argument in support of clemency he cares to. On the other hand, the Board desires to hear the condemned speak for himself at least in small part, in weighing the appropriateness of a recommendation for clemency. This procedure no more interferes with the attorney-client relationship than the necessary election of the accused at trial to take the stand or not during the punishment phase of a capital trial.

The Death Penalty Clemency Procedures Do Not Require Woodard to Make A Statement

Woodard alleges that the Death Penalty Clemency Procedures violate his right against self-incrimination.

Paragraph C.1. of the Procedures provides in pertinent part:

The parole board chair will cause the notice advising that the board will be considering his case for a clemency recommendation to be personally delivered to the prisoner. This notice shall advise him that *if he requests in writing*, he will be interviewed by one or more parole board members or hearing officers prior to the board considering his case. (emphasis added) Clearly Woodard's claim of compelled self-incrimination is not supported by the words of the

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[1]It is clear from the complaint that Woodard did in fact consult with counsel prior to electing not to submit to a Parole Board interview in support of clemency.

Procedures and is patently frivolous.[2]

Ohio Death Penalty Procedures Do Not Result In Cruel and Unusual Punishment

> [Clemency] is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court.

Herrera v. Collins, supra at 867, quoting *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160-161 (1833). Clemency or the denial thereof does not impose punishment. A decision on clemency is a decision on whether or not relief should be granted from lawfully imposed punishment.[3]

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[2]There is no right to remain silent after a final judgment of conviction is affirmed on direct appeal or immunity is conferred. *See Reina v. United States*, 364 U.S.507, 513 (1960). However, the defendants respectfully submit that this issue is not before the Court.

[3]The issue of capital punishment being cruel and unusual punishment is not properly before the Court in this action. The defendants note that in Section II, paragraph 2 of the complaint, Woodard specifically states that the action is not intended to affect

CONCLUSION

42 U.S.C. §1983 is intended to provide remedies for deprivations of constitutionally protected interests. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). The defendants respectfully submit that Woodard can prove no set of facts which establish a constitutional deprivation and entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

There is no right to clemency under the federal Constitution or Ohio law. *Connecticut Bd. Of Pardons v. Dumschat, supra; State ex rel. Maurer v. Sheward, supra.* Therefore, there is no right to Fourteenth Amendment due process regarding a procedure that does not involve a pre-existing right. *Jago v. Van Curen, supra.*

The Sixth Amendment right to counsel is limited to criminal proceedings. *Hannah v. Larche, supra.* The Clemency Procedures are not a part of criminal proceedings.

The Death Penalty Clemency Procedures require an inmate to request in writing to submit to an interview by the Board. Perforce, there is no violation of the right against self-incrimination.

The clemency procedures involve a consideration of the appropriateness of a gratuitous remission of lawfully imposed punishment. It is pure sophistry to allege that the review process itself is cruel or unusual punishment.

For the foregoing reasons, the defendants ask the

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his state conviction and/or sentences "including his death sentence." Nonetheless, the present state of the law is that capital punishment itself is not cruel and unusual punishment. *Gregg v. Georgia*, 428 U.S. 153,187 (1976).

Court to enter judgment on the pleadings in their favor and order the complaint dismissed.

[SUBSCRIPTION OMITTED IN PRINTING]

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[CAPTION OMITTED IN PRINTING]

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

STATEMENT OF FACTS

Plaintiff Eugene Woodard, who was sentenced to death in Ohio's electric chair, brings this case to challenge the constitutionality of Ohio procedures for determining whether he will be granted an opportunity for clemency.

He was sentenced to death on December 6, 1990.

On August 24, 1994, the Supreme Court of Ohio issued a stay of execution to permit Mr. Woodard to pursue state post-conviction relief.

On September 6, 1994, counsel for Mr. Woodard received telephone notice that the Defendants intended to conduct clemency proceedings regarding Mr. Woodard's execution. The proceedings were to be conducted pursuant to the Death Penalty Clemency Procedure promulgated by the Adult Parole Authority ("APA"), but that Mr. Woodard would not:

1. be permitted to attend the hearing;

2. be represented by counsel;

3. present witnesses or evidence on his behalf;

4. know the evidence against a granting of clemency;

5. nor would his counsel be permitted to attend the hearing or in any way participate in the clemency process.

Counsel was further informed that the APA would interview Mr. Woodard on September 9, 1994.

On September 7, 1994, counsel for Mr. Woodard requested the right to attend any hearing or interview conducted relating to Mr. Woodard's clemency hearing and a continuance of the hearing to permit a thorough investigation of the matter. Further, counsel noted that there was ample time for a careful treatment of Mr. Woodard's case for clemency because a stay of execution had been ordered by the Supreme Court of Ohio. The Defendants never responded to this request.

On September 14, 1994, Mr. Woodard initiated the present action alleging a violation of his constitutional rights and seeking relief under 42 U.S.C. Section 1983.

On September 15, 1994, the parties agreed to stay the clemency proceedings pending the instant action.

On November 29, 1994, a preliminary pretrial conference was held before Magistrate Judge Terence Kemp.

On December 7, 1994, Mr. Woodard requested discovery of policies, procedures and documents relating to

the clemency process.

On January 9, 1995, the Defendants moved to dismiss the complaint for failure to state a claim for which relief could be granted.

On January 9, 1995, the Defendants filed a motion for a protective order prohibiting discovery.

ARGUMENT

I. CLAIM FOR RELIEF

A. INTRODUCTION

Defendants move this Court for a judgment on the pleadings claiming that Mr. Woodard "cannot establish any facts to support his claims." (Def. Motion p. 4.) The Defendants' motion which is, in effect, a motion to dismiss for failure to state a claim, should be denied because the Plaintiff has pleaded sufficient facts to allege a claim for which relief can be granted.

Mr. Woodard's complaint alleges that the clemency process in Ohio deprives him of his Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendment right against self-incrimination, right to counsel, right to be free of cruel and unusual punishment, and the rights to due process and equal protection of the law. Specifically, Mr. Woodard claims the right to have an attorney present during questioning, be represented by counsel at any clemency hearing, to a meaningful clemency hearing, and to meaningful participation in the clemency process. The State of Ohio has chosen to make clemency available and to provide a clemency process. Having done so, the clemency process must comply with the protections of the Due Process and Equal Protection Clauses.

McGee v. Arizona State Board of Pardons and Paroles, 92 Ariz. 317, 376 P.2d 779 (1962). *See also, Evitts v. Lucey*, 469 U.S. 387 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gideon; Brown v. Bd. of Education*, 347 U.S. 483 (1953). These federal constitutional rights vest with Mr. Woodard directly from the Constitution, laws, and policies of Ohio. Therefore, the complaint alleges a claim for which relief can be granted.

B. STATE CREATED RIGHT

The Defendants are required to engage in a thorough investigation into the propriety of granting clemency, Ohio Rev. Code Sec. 2967.07; Death Penalty Clemency Procedure; and yet Mr. Woodard is not permitted to attend the hearing or be represented by counsel. At no time in the process at issue in this case would counsel for Mr. Woodard be permitted to participate, present evidence or witnesses, or clarify, rebut or confront witnesses or evidence against Mr. Woodard. Death Penalty Clemency Procedure, Section IV(C)(2) and (D)(3). This denial destroys the reliability of clemency proceedings and prevents the thorough investigation and factual development required by Ohio laws and procedure.

Mr. Woodard is presently represented by counsel and is pursuing state post-conviction relief challenging the constitutionality of his convictions and sentences and has not waived the presence or assistance of counsel. State post-conviction proceedings are civil lawsuits between an inmate and the State of Ohio. *State v. Milanovich*, 42 Ohio St.2d 46 (1975). As part of the Death Penalty Clemency Procedure the Defendants intend to interview Mr. Woodard about the facts, nature and circumstances of the crime for which he was convicted. Ohio Rev. Code Sec. 2967.07; Death

Penalty Clemency Procedure, Section IV(C)(2). These matters are the subject of the petition for state post-conviction relief and are being contested by Mr. Woodard. Counsel for Mr. Woodard is prohibited from attending the APA's proposed interview. Death Penalty Clemency Procedure, Section IV(C)(2). Requiring Mr. Woodard to discuss the case with the State of Ohio without the presence of counsel violates the most basic premise of due process, as well as his right to counsel and his right to remain silent. *See Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); Code of Professional Responsibility, DR 7-104.

In the instant action, Mr. Woodard requests that the State comply with minimal Constitutional requirements in conducting his clemency hearing. Mr. Woodard is not seeking a judicial determination of his right to clemency but rather, is seeking due process of law in any clemency hearing.

C. *DUMSCHAT* IS NOT DISPOSITIVE

The Defendants' reliance upon *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981), to claim that Mr. Woodard is not entitled to clemency, and therefore has no constitutional protections throughout the clemency process, is misplaced for numerous reasons. First, the Defendants argue that *Dumschat* eliminated any claim for due process in clemency decisions. In *Dumschat*, however, the Supreme Court held only that there was no right to clemency created by the Connecticut statutes. *Contra, Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1976). What the Court did not address was whether a person sentenced to death has an expectation, based on state law, policy, and historical practice, of a thorough investigation into the facts and evidence in a clemency hearing granted by the state.

That is the issue before this Court. Although a state may not be required to do an act, once it chooses to act, the action must comply with the protections of the Due Process and Equal Protection Clauses. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gideon; Brown v. Bd. of Education*, 347 U.S. 483 (1953).

Second, the inmates in *Dumschat* sought written reports and rationales for the denial of parole. The Connecticut operating statute did not require any reasons or rationale for the denial of parole and therefore no written justification for denial was required. However, Ohio Rev. Code Sec. 2967.07 dictates that the APA "shall report in writing to the governor a brief statement of the facts in the case, together with the recommendation of the authority for or against the granting of a pardon, commutation, or reprieve, the grounds therefore and the records or minutes relating to the case." Since Ohio law mandates a written report, the rationale for the granting or denial of clemency must be provided in that manner.

Third, Mr. Woodard is seeking due process protection of a "life" interest, namely his own life, as well as "liberty" and "property" interests. The inmates of *Dumschat* were only seeking due process protection of a "liberty" interest. Of all interests protected by due process, clearly a "life" interest is deserving of the greatest protection. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

Fourth, Mr. Woodard's right is not a unilateral expectation, rather, it is a right created by the statutes, policies, and historical practice of the State of Ohio. Ohio Rev. Code Sec. 2967.07 dictates that the APA "*shall*" conduct a "thorough investigation into the propriety of granting a pardon, commutation, or reprieve." Statutes can

create a due process right if policies, procedures, criteria or other duties are mandated. *Dumschat*, 452 U.S. at 465, 466; *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12 (1979); *Wolff v. McDonnell*, 418 U.S. 539 (1974). In this respect, the instant case is more akin to *Greenholtz* than *Dumschat*. In *Greenholtz*, once a final hearing was granted, the statute provided for notice to the inmate, presentation of evidence and witnesses, representation by counsel, and a written report. The Supreme Court held that these procedures met the minimum Constitutional requirements for due process. *Greenholtz*, 442 U.S. at 16. Conversely, the statute at issue in *Dumschat* vested discretion with the executive agency in deciding whether to grant or deny parole. Unlike Ohio, there was no requirement for a thorough investigation, hearing, notice, representation, presentation of evidence or witnesses, or written report. Under those circumstances, no due process protections were necessary. As in *Greenholtz*, the mandates of Ohio law and procedure establish Mr. Woodard's interest in meaningful participation in the clemency process.

Fifth, unlike the parole policy in *Dumschat*, the Ohio policy adopted by the APA imposes substantial duties on the APA. These duties and obligations vest a due process right with Mr. Woodard. *Evitts*. The APA is required to:

1. investigate "the details of the prisoner's offense, prior record and other relevant information," Death Penalty Clemency Procedure Section IV(B)(2);

2. send notice of any hearing to the "sentencing court, prosecutor, and the victim's

family or representative," Death Penalty Clemency Procedure Section IV(B)(3);

3. send notice to the inmate and his or her counsel, Death Penalty Clemency Procedure, Section IV(B)(4);

4. "consider all relevant information," Death Penalty Clemency Procedure, Section IV(E)(1);

5. transcribe minutes of the hearing, Death Penalty Clemency Procedure, Section IV(E)(2); and

6. transmit a written report to the governor, Death Penalty Clemency Procedure, Section IV(B)(5) and (E)(3).

As specifically recognized in *Dumschat*, a constitutional due process claim arises from the "statutes or other rules defining the obligations of the authority charged with exercising clemency." *Dumschat*, 452 U.S. at 465.

Finally, *Dumschat* does not prohibit a "liberty" interest from vesting with Mr. Woodard. As recognized in *Dumschat*, *Greenholtz*, and *Wolff*, a historical granting of rights may create a legitimate expectation of process warranting protection by the Due Process and Equal Protection Clauses. Clemency is both a historic remedy and the failsafe of our system of criminal jurisprudence. *Herrera*

v. Collins, ____ U.S. ____, 113 S.Ct. 853, 866 (1993). In fact, the founding fathers believed that a criminal justice system devoid of clemency would indeed be cruel. Federalist No. 74 (Alexander Hamilton). It is Mr. Woodard's contention that Ohio has historically provided meaningful review and participation by the condemned in the clemency process. Mr. Woodard has sought discovery of information and materials to support such a historical claim but the Defendants have refused to release the information and seek to stay discovery indefinitely. It is premature at this juncture to eliminate this claim.

II. DUE PROCESS REQUIREMENTS

As is oft repeated, death is qualitatively different from all other sentences and more process is due when the interest to be forfeited is a life interest. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearings appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950). One of the fundamental rights inherent in our system of justice is the right to notice and the opportunity to be heard. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1950); *Re Oliver*, 333 U.S. 257, 273 (1947); *Palko v. Connecticut*, 302 U.S. 319, 327 (1937); *overruled on other grounds; Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

The concept of due process is not a technical concept of legal rules, but rather a flexible determination of rights and privileges required in a particular situation. *Mathews v.*

Eldridge, 424 U.S. 319, 334 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Since due process is flexible, the requirements must be determined in light of the facts of the specific situation at bar. *Mathews*, 408 U.S. at 335; *Goldberg*, 397 U.S. at 263-271. Specifically, three factors must be evaluated and balanced against one another. First, the private interest must be identified. Mr. Woodard claims a life, liberty, and property interest in his own life and the meaningful and thorough clemency process. The Ohio Revised Code and the Death Penalty Clemency Procedure protect this interest and process. The interest in life is the greatest interest an individual can have and must be given the greatest protections possible. *Woodson.*

Second, the risk of error in depriving Mr. Woodard of his life, liberty, and property rights must be examined. *Mathews*, 424 U.S. at 335; *Goldberg*, 397 U.S. at 263-271. As the Clemency Procedure stands now, Mr. Woodard is not able to attend the hearing, be represented by counsel at the hearing, present witnesses or other evidence at the hearing, monitor, confront, or even know the witnesses and evidence against him, correct any factual inaccuracies presented to the APA or in any other way participate in a meaningful manner in a hearing held to determine whether he should live or die. An error at the clemency stage of the death penalty process is final and irreversible. *Herrera v. Collins*, ____ U.S. ____, 113 S.Ct. 853 (1993). The procedure employed by Ohio in no way insures that the information needed to make a reasoned and sound decision will be presented to the APA. The risk of error is so extreme as to require *at least* the same measure of process due parole revocation hearings, *Morrissey*, denial of public assistance benefits, *Goldberg*, unemployment compensation benefits, *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975), or the denial of social security

benefits, *Mathews*. Moreover, due to the irreversibility and finality of an execution, *more* process is due than in other criminal or civil matters. *Woodson*.

Third, the Government's interest must be considered and this interest also militates in favor of due process protections being provided. *Mathews*, 424 U.S. at 335; *Goldberg*, 397 U.S. at 263-271. Although the government has an interest in the fair imposition of its criminal penalties, the state has no legitimate interest in executing an innocent man, or in a rush to execution depriving Mr. Woodard of the due process protection of the Fourteenth Amendment. Equally so, the state has no legitimate interest in executing Mr. Woodard if he is deserving of clemency. Rather, the state has an interest in ensuring that the clemency process guarantees the due process protections in order to avoid the arbitrary and capricious imposition of the death sentence. *Herrera, Furman v. Georgia*, 408 U.S. 238 (1972). Ohio Rev. Code Sec. 2967.07 and the Death Penalty Clemency Procedure recognize this state interest by requiring a thorough investigation into the matter and a written report containing the justifications for the recommendation submitted by the reviewing body.

The interest of Mr. Woodard in receiving, and the State in providing due process in the clemency procedure is clearly greater than any interest in denying due process and thorough review to a person sentenced to death. *See Herrera*. Therefore, the protections of the Due Process Clause vest with Mr. Woodard.

III. *MAURER* IS NOT DISPOSITIVE

The Defendant's reliance on *State ex re. Maurer v. Sheward*, 71 Ohio St. 3d 513 (1994), is misplaced. *Maurer* addressed the ability of the General Assembly to impose

limitations on the governor's decisions to grant commutations of sentences. As correctly pointed out by the Defendants, the General Assembly has no authority to "prescribe substantive regulations concerning the Governor's discretion in the use of the clemency power." *Id.* at 519-520. However, the situation in the case at bar is different from that in *Maurer* for three reasons. First, the Death Penalty Clemency Procedure is a creation of the executive branch, not the legislative branch. Through its promulgation, the governor created a procedure to assist in the exercise of his discretionary power. Although there is no requirement in the absence of a procedure, once created, the procedure must abide by the constraints of the Due Process Clause of the Fourteenth Amendment. *Evitts; Mathews; Morrissey; Gideon; Brown.*

To argue that the governor possesses unfettered discretion in adopting a clemency policy is blatantly incorrect. It is indisputable that the governor could not adopt a policy whereby white defendants were granted clemency but African-American defendants were denied clemency. Such a policy would be such an absolute violation of due process, equal protections and the system of justice in the United States as to be preposterous. That policy would clearly be subject to judicial review, regulation and, rightfully so, condemnation. The instant case presents a similar situation whereby the procedure adopted by the governor is subject to judicial review as applied.

Second, the requirements of Ohio Rev. Code Sec. 2967.07 at issue in this case go to procedural matters and protections, not substantive regulation. *Maurer* prevents substantive regulation but not procedural. *Id.* at 519-520. The thorough investigation and written report requirements do not infringe in any way upon the discretion of the governor but merely provide mechanism for the sound

exercise of that discretion.

Third, *Maurer* specifically recognized that the granting of pardons is subject to legislative regulation. *Maurer* at slip. op. 519, 525. Based upon, or in spite of, the APA recommendation and report, the governor can grant or deny a full pardon or a partial pardon. But the governor is constrained by the procedures imposed by the General Assembly. In the instant case, Mr. Woodard is eligible for the full panoply of clemency: full pardon, partial pardon, reprieve, or commutation. As this aspect of the clemency process is subject to legislative regulation, the procedural requirements of Ohio Rev. Code Sec. 2967.07 must be satisfied before the governor can consider granting a pardon to Mr. Woodard, or any death sentenced individual. These procedural requirements mandate that Mr. Woodard be afforded due process. *Evitts; Mathews; Morrissey; Gideon; Brown.*

CONCLUSION

The State of Ohio created the Death Penalty Clemency Procedure, enacted statutes guiding the clemency process. These voluntary actions by the State vested due process protections with Mr. Woodard. *Evitts*. The Defendants now intend to engage in a constitutional rights bait and switch by granting a hearing and clemency process and then denying any opportunity for meaningful participation in the clemency process. The statutes, policies, and procedures adopted by the State of Ohio grant an unambiguous right. However, the State is now attempting to grant only the illusion of that right. The Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States mandates more than the illusion of rights. For these reasons, Mr. Woodard respectfully requests this Court deny the

Defendants' motion for judgment on the pleadings and allow the case to proceed for a judgment on its merits.

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UNITED STATES DISTRICT JUDGE
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Eugene Woodard,	:	
Plaintiff,	:	
v.	:	Case No. C2-94-892
Ohio Adult Parole Authority, et al.,	:	JUDGE KINNEARY
Defendants.	:	

REPORT AND RECOMMENDATION

(Found in the Appendix to the Petition for Certiorari at A-43.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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PLAINTIFF'S OBJECTIONS TO
MAGISTRATE'S REPORT AND RECOMMENDATION

Pursuant to Order 91-3, Order 1(F)(6) of the local rules for this district and F.R.C.P. 72 Plaintiff Eugene Woodard, by and through counsel, hereby objects to the magistrate's report and recommendation filed in this Court on June 20, 1995.

Plaintiff objects to the Magistrate's proposed findings, recommendations, and report holding that: (1) "no right to clemency has been created by the state and procedural due process protections are not triggered;" (2) "there is no right to clemency which is so vital that 'neither liberty nor justice would exist if [it] were sacrificed'" and there is no substantive due process claim; (3) the Fifth Amendment to the Constitution of the United States is not implicated; (4) the Sixth Amendment to the Constitution of the United States is not implicated; (5) the Eighth Amendment to the Constitution of the United States is not implicated; and (6) the failure of the Magistrate to address the Plaintiff's claim that his rights under the Ninth Amendment to the Constitution of the United States were violated.

A Memorandum setting forth the basis for the objections is attached and incorporated into the Objections to the Magistrate's Report and Recommendation.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[CAPTION OMITTED IN PRINTING]

MEMORANDUM IN SUPPORT

1. MR. WOODARD POSSESSES A PROCEDURAL DUE PROCESS RIGHT TO PARTICIPATE IN A FAIR AND MEANINGFUL MANNER IN THE CLEMENCY PROCESS ESTABLISHED BY THE STATE OF OHIO.

The magistrate's report concluded that Mr. Woodard was not entitled to procedural due process protections because the State did not create a right to clemency. This is not the issue before the Court. Mr. Woodard claims a right to procedural due process in the Death Penalty Clemency Procedure ("Clemency Procedure") established and adopted by the Ohio Adult Parole Authority ("OAPA"). Mr. Woodard is not claiming a right to clemency but rather is claiming a right to meaningfully participate in the decision making process established by the State. The State of Ohio has chosen to make clemency available and to provide a clemency process. Ohio Rev. Code Sec. 2967.07; Death Penalty Clemency Procedure. Having done so, the clemency process must comply with the protections of the Due Process and Equal Protection Clauses. *McGee v. Arizona State Board of Pardons and Paroles*, 92 Ariz. 317, 376 P.2d 779

(1962). *See also, Evitts v. Lucey*, 469 U.S. 387 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Brown v. Bd. of Education*, 347 U.S. 483 (1953). These federal constitutional rights best with Mr. Woodard directly from the Constitution, laws, and polices of Ohio. Therefore, the complaint alleges a claim for which relief can be granted.

In the instant action, Mr. Woodard requests that the State comply with minimal Constitutional requirements in conducting his clemency hearing. To reiterate, Mr. Woodard is not seeking a judicial determination of his right to clemency but rather, is seeking due process of law in clemency proceedings afforded to him. The due process violation here is that the Governor has set up a clemency procedure which denies death-sentenced persons such as Mr. Woodard a meaningful opportunity to participate and be heard.

2. THE GOVERNOR OF OHIO DOES NOT POSSESS U N F E T T E R E D DISCRETION.

The Magistrate's report concluded that the governor of Ohio has almost unfettered discretion in making a clemency decision. However, the reliance on *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513 (1994), is misplaced. *Maurer* addressed the ability of the General Assembly to impose limitations on the governor's decisions to grant commutations of sentences. As correctly pointed out by Defendants, the General Assembly has no authority to "prescribe substantive regulations concerning the Governor's discretion in the use of the clemency power." *Id.* at 519-520. However, the situation in the case at bar is different

from that in *Maurer* for three reasons. First, the Death Penalty Clemency Procedure is a creation of the executive branch, not the legislative branch. Through its promulgation, the governor created a procedure to assist in the exercise of his discretionary power. Although there is no requirement in the absence of a procedure, once created, the procedure must abide by the constraints of the Due Process Clause of the Fourteenth Amendment. *Evitts; Mathews; Morrissey; Gideon; Brown.*

To argue that the governor possesses unfettered discretion in adopting a clemency policy is blatantly incorrect. It is indisputable that the governor could not adopt a policy whereby white defendants were granted clemency but African-American defendants were denied clemency. Such a policy would constitute an absolute violation of the due process, equal protection and the system of justice in the United States. That policy would clearly be subject to judicial review, regulation and, rightfully so, condemnation. The instant case presents a similar situation whereby the procedure adopted by the governor is subject to judicial review as applied.

Second, the requirements of Ohio Rev. Code Sec. 2967.07 at issue in this case go to procedural matters and protections, not substantive regulation. *Maurer* prevents substantive regulation but not procedural. *Id.* at 519-520. The thorough investigation and written report requirements do not infringe in any way upon the discretion of the governor but merely provide a mechanism for the sound exercise of that discretion.

Third, *Maurer* specifically recognized that the granting of *pardons* is subject to legislative regulation. *Maurer*, at 519, 525. Based upon, or in spite of, the OAPA recommendation and report, the governor can grant or deny

a full pardon or a partial pardon. But the governor is constrained by the procedures imposed by the General Assembly. In the instant case, Mr. Woodard is eligible for the full panoply of clemency: full pardon, partial pardon, reprieve, or commutation. As a *pardon* is subject to legislative regulations, the procedural requirements of Ohio Rev. Code Sec. 2967.07 must be satisfied before the governor can consider granting a pardon to Mr. Woodard, or any death sentenced individual. These procedural requirements mandate that Mr. Woodard be afforded due process. *Evitts; Mathews; Morrissey; Gideon; Brown.*

3. MR. WOODARD POSSESSES A SUBSTANTIVE DUE PROCESS RIGHT TO APPLY FOR A CLEMENCY.

The Magistrate's report concluded that Mr. Woodard raised no substantive due process claim because there is no right to clemency. Once again, the Magistrate addressed the issue as a claim for clemency. However, Mr. Woodard has never claimed that he has a right to clemency, rather he has claimed a right to the clemency hearing established by the Clemency Procedure. Clemency is both a historic remedy and the fail-safe of our system of criminal jurisprudence. *Herrera v. Collins,* ___ U.S. ____, 113 S.Ct. 853, 866 (1993). In fact, the founding fathers believed that a criminal justice system devoid of clemency would indeed be cruel. Federalist No. 74 (Alexander Hamilton). Mr. Woodard contended that Ohio has historically provided meaningful review and participation by the condemned in the clemency process. Therefore, the State of Ohio has indeed created a substantive due process right in the clemency process.

4. THE FIFTH, SIXTH, EIGHTH, NINTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES PROVIDE SUBSTANTIVE AND PROCEDURAL PROTECTIONS TO MR. WOODARD.

The Magistrate's report concluded that the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the Constitution of the United States were not implicated because the decision to participate in the clemency process is voluntary. However, the voluntariness of the decision creates an intolerable constitutional dilemma. *Simmons v. United States*, 390 U.S. 377, 394 (1968). The Hobson's choice forced upon Mr. Woodard is whether to remain silent on the ongoing litigation for his life or discuss the merits of his claims with the State in an attempt to win clemency. (Fifth Amendment Right). Whether to maintain the attorney-client privilege and secure his right to counsel or discuss his situation and case, without the benefit of counsel, with those seeking to execute him. (Sixth Amendment Right). Whether to continue to challenge his death sentence or attempt to win clemency in the current political climate. (Eighth and Ninth Amendment Rights). Again, the underlying right is not the right to clemency, but the right to be involved in the decision making process. The State has created a due process right in the Clemency Procedure and therefore Mr. Woodard cannot be forced to chose one constitutional right to the detriment of another.

5. MR. WOODARD IS ENTITLED TO FURTHER DISCOVERY.

The Magistrate recommended that the Defendant's motion to stay discovery be dismissed as moot. In order to reach this decision, the Magistrate made a judgment as to the value of the evidence *not* disclosed by the Defendants. The failure of the Defendants to meaningfully comply with discovery prevented Mr. Woodard from fully developing and presenting an analysis of the historic right to due process in clemency hearings. The Magistrate's decision that the withheld evidence could provide no support for Mr. Woodard's claims is without foundation in law or fact and should be rejected. Only by engaging in full discovery can the true nature of the State's Clemency Procedure be explored.

6. CONCLUSION

For the above stated reasons, Mr. Woodard asks that the Magistrate's Report and Recommendation be rejected, that this Court order the Defendants to comply with the discovery orders of this Court, and that Mr. Woodard's claims be permitted to proceed to a decision on the merits.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EUGENE WOODARD,

Plaintiff,

v. Case No. C-2-94-892

OHIO ADULT PAROLE
AUTHORITY, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court ADOPTS the Report and Recommendation entered by June 20, 1995. The Defendants' motion for judgment on the pleadings is GRANTED. This case is hereby terminated.

KENNETH J. MURPHY, CLERK
(By) W.J. Harrison, Deputy Clerk

DATE: September 8, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EUGENE WOODARD,

Plaintiff,

v. Case No. C-2-94-892

OHIO ADULT PAROLE AUTHORITY, et al.,

Defendants.

OPINION AND ORDER

(Found in the Appendix to the Petition for Certiorari at A-41.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[CAPTION OMITTED IN PRINTING]

NOTICE OF APPEAL

Notice is hereby given that *EUGENE WOODARD* appeals to the United States Court of Appeals for the Sixth Circuit from the (*X*) Judgment (___) Order (____) Other (specify) _____ entered in this action on *September 8, 1995*.
(Date)

[SUBSCRIPTION OMITTED IN PRINTING]

Date: *October 10, 1995*

No. 95-4099

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EUGENE WOODARD,
Plaintiff-Appellant,

v.

OHIO ADULT PAROLE AUTHORITY, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio

Decided and Filed March 3, 1997

OPINION

(Found in the Appendix to the Petition for Certiorari at A-1.)

Respectfully submitted,

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Date: August 21, 1997